SUPREME COURT, U. S.
MAR 27 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1443

UNIVERSITY OF HOUSTON,
LAMAR UNIVERSITY, ET AL.,
Petitioners

VS.

MARVIN A. WURZER, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

JOHN W. ODAM
Staff Legal Assistant Attorney General

J. C. DAVIS
Assistant Attorney General

SAM L. JONES, JR.
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. ___

UNIVERSITY OF HOUSTON,
LAMAR UNIVERSITY, ET AL.,
Petitioners

VS.

MARVIN A. WURZER, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Petitioners, University of Houston, Lamar University, et al., pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 7, 1973.

OPINION BELOW

The Opinion of the Court of Appeals for the Fifth Circuit reversing and remanding the Judgment and Order of the District Court for the Southern District of Texas is reprinted in the Appendix, infra, pp. 1a to 4a. A Petition for rehearing was denied by the Court of Appeals on December 28, 1973, and the notice of said Order to all Counsel of record is reprinted in the Appendix, infra, pp. 5a. The Order of the District Court for the Southern District of Texas which was reversed and remanded is reprinted along with notice of the Court's Calendar ruling in the Appendix, infra, pp. 6a. The Memorandum Opinion of the Three-Judge Court in *Weaver v. Kelton, et al,* Civil Action No. 7784 (E.D. Tex. 1973) cited in Trial Court's Order is reprinted in the Appendix, infra, pp. 9a to 19a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 7, 1973. This Court has jurisdiction of this Petition for Writ of Certiorari pursuant to 28 U.S.C., Section 1254 (1) and (2).

QUESTIONS PRESENTED

Where the laws of the State, which are challenged in the complaint on constitutional grounds, have been re-

cently upheld as constitutionally valid by a Three-Judge Court and by the United States Supreme Court in a recent similar case, is the District Court judicially in error to dismiss the complaint on the basis that no substantial federal question remains to be decided?

Does an alleged misapplication of valid Texas Statutes, which prescribe resident requirements for tuition purposes in Texas State Colleges, constitute a violation of Plaintiff-Respondents' Constitutional rights such as to present a substantial federal question for the determination of a Three-Judge Court?

STATEMENT OF THE NATURE OF THE CASE

The Complaint was brought by student-plaintiffs attenting the University of Houston and Lamar University against these institutions of higher learning which are official agencies of the State of Texas. The Complaint prays on page 20 thereof "That a declaratory judgment issue declaring that sections 54.051 through 54.056 of the Education Code of the State of Texas, are void as violating the Constitution of the United States insofar as the same are written and applied to plaintiffs and to the classes which they represent." *The Complaint further prays that "in the event the statute (Article 54.052 of the Texas Education Code) should be declared constitutional and valid—that the Court declare the statute unconstitutional as applied to each plaintiff . . ."*

The Defendants filed a Motion to Dismiss on the grounds that no substantial federal question was presented by the Complaint; that a same or similar complaint had been decided adversely to Plaintiffs just a month before in *Weaver v. Kelton* by a Three-Judge Court in Beaumont where party-Defendant herein Lamar University was the Defendant. The Memorandum Opinion of the Three-Judge Court in *Weaver v. Kelton, et al,* C.A. No. 7784 (E.D.Tex. 1973) is reprinted in the Appendix, infra, pp. 9a to 19a, and also *Starnves v. Malkerson*, 326 F.Supp. 234 (D.Minn. 1970), aff'd without opinion, 401 U.S. 985 (1971). Defendants Motion to Dismiss was unopposed by Plaintiffs and the District Court granted same citing the above two cases from which Order this appeal was made.

The Court of Appeals for the Fifth Circuit reversed and remanded the case for the empaneling of a Three-Judge Court.

REASONS FOR GRANTING THE WRIT

1. Lamar University is a Defendant-Petitioner in this suit. Lamar University was the Defendant in *Weaver v. Kelton*, supra, where the same State statute was challenged and where a Three-Judge Court was empaneled and found adversely to Plaintiffs holding that a substantial federal question was not presented which had not already been answered by *Starnes v. Malkerson*, supra.

2. The opinion below states on page 3 that *Starnes* was decided on somewhat different facts from those alleged in the case at bar. However, the statutes which are challenged are substantially the same and a substantial constitutional question does not necessarily arise because a plaintiff alleges that a college registrar misapplies the tuition statutes to his facts.

3. Any appeal from a student-resident classification for tuition purposes by a college registrar should be made in State Court where the appeal is based upon personal facts applying to each student and where the constitutional validity of the applicable statutes have already been approved in federal court.

ARGUMENTS AND AUTHORITIES

The challenged sections of the Texas Education Code, Sections 54.051 through 54.056 are reprinted for consideration together as follows:

Section 54.051. Tuition Rates

"(a) The governing board of each institution of higher education shall cause to be collected from students registering at the institution tuition or registration fees at the rates prescribed in this section.

"(b) Tuition for resident students, except as otherwise hereinafter provided, is $4 per semester credit hour, but the total of such charge shall not be less than $50 per semester.

"(c) Tuition for nonresident students, except as otherwise hereinafter provided, is $40 per semester credit hour.

"(d) Resident or nonresident students registered for thesis or dissertation credit only, in those instances where such credit is the final credit hour requirement for the degree in progress, shall pay a sum proportionately less than herein prescribed but not more than $50.

"(e) Tuition for resident students registered in a medical or dental branch, school or college is $400 per academic year of 12 months.

"(f) Tuition for nonresident students registered in a medical or dental branch, school or college is $1,200 per academic year of 12 months.

"(g) Resident or nonresident students registered for a course or courses in art, architecture, drama, speech, or music, where individual coaching or instruction is the usual method of instruction, shall pay a fee in addition to the regular tuition, said fee to be designated by the governing board of such institution; but in no event shall such fees be more per course per semester of four and one-half months or per summer session than $75.

"(h) Tuition for students who are citizens of any country other than the United States of America is $14 per semester credit hour, but the total of such charge shall be not less than $200.

"(i) Tuition for students who are citizens of any country other than the United States of America registered in a medical or dental branch, school or college is $800 per academic year of 12 months.

"(j) Tuition for nonresident students registered

in a public junior college is as provided in Subsection (b), Section 130.003 of the Texas Education Code.

"(k) Tuition for students registered in a school of nursing as a nursing student is $50 per semester and per 12-week summer session.

"(l) Tuition for students registered in a school of nursing as a nursing student for less than 12 semester credit hours of work or for less than a full semester credit hour or term hour load during a summer session shall pay an amount proportionately less than the amount provided in Subsection (k) of this section, but not less than $20.

"(m) Twenty-five cents out of each hourly charge in Subsection (b) and $1.50 out of each hourly charge in Subsection (c) of this section shall be placed in a scholarship fund at each institution to be administered by that institution to award scholarships to needy students. Standards for determining need shall be formulated by each institution. No more than 10 percent of said scholarship funds may be allocated to out-of-state students.

"(n) Notwithstanding the preceding provisions of this section, any nonresident student who is enrolled for the spring semester of 1971 in an institution covered by this section may continue to enroll at the same institution at the same tuition rate that was effective at the time of his original enrollment until one of the following conditions first occurs:

(1) he receives the degree at the degree level (i. e., the baccalaureate, master's, or doctoral degree) toward which he is working during the spring semester of 1971; or

(2) he voluntarily withdraws from the institution or the institution involuntarily withdraws the student for disciplinary reasons or for failing to meet the academic standards of the institution; or

(3) the termination of the spring semester of 1975.

"(o) A teaching assistant, research assistant, or other student employee of any institution covered by this section is entitled to register himself, his spouse, and their children in a state institution of higher education by paying the tuition fees and other fees or charges required for Texas residents, without regard to the length of time he has resided in Texas; provided that said student employee is employed at least one-half time in a position which relates to his degree program under rules and regulations established by the employer institution. This exemption shall continue for students employed two consecutive semesters through the summer session following such employment if the institution is unable to provide employment and, as determined under standards established by the institution, if the employee has satisfactorily completed his employment.

"(p) A nonresident student holding a competitive scholarship of at least $200 for the academic year or summer for which he is enrolled is entitled to pay the fees and charges required of Texas residents without regard to the length of time he has resided in Texas, provided that he must compete with other students, including Texas residents, for the scholarship and that the scholarship must be awarded by a scholarship committee officially recognized by the administration of the institution of higher education."

Amended by Acts 1971, 62nd Leg., p. 3352, ch. 1024, art. 2, §29, eff. Sept. 1, 1971.

Section 54.052. Residents; Nonresidents; General Rules

"(a) The term 'residence,' as used in this subchapter, means 'domicile.' The term 'resided in' means 'domiciled in.' For the purposes of this subchapter, the status of a student as a resident or nonresident student is determined as prescribed by this section, subject to the other applicable provisions of this subchapter.

"(b) An individual under 21 years of age who is living away from his family and whose family resides in another state or has not resided in Texas for the 12-month period immediately preceding the date of registration shall be classified as a nonresident student.

"(c) An individual 21 years of age or under whose family has not resided in Texas for the 12-month period immediately preceding the date of registration shall be classified as a nonresident student, regardless of whether he has become the legal ward of residents of Texas or has been adopted by residents of Texas while he is attending an educational institution in Texas, or within a 12-month period before his attendance, or under circumstances indicating that the guardianship or adoption was for the purpose of obtaining status as a resident student.

"(d) An individual 21 years of age or over who has come from outside Texas and who is gainfully employed in Texas for a 12-month period immediately preceding registration in an educational institution shall be classified as a resident student

as long as he continues to maintain a legal residence in Texas.

"(e) An individual 21 years of age or over who resides out of the state or who has come from outside Texas and who registers in an educational institution before having resided in Texas for a 12-month period shall be classified as a nonresident student."

Section 54.053. Regulations of Coordinating Board

"The governing board of each institution required by this chapter to charge a nonresident tuition or registration fee is subject to the rules, regulations, and interpretations issued by the Coordinating Board, Texas College and University System, for the administration of the nonresident tuition provisions of this subchapter. The rules, regulations, and interpretations promulgated by the coordinating board shall be furnished to the presidents or administrative heads of all Texas public senior or junior colleges and universities."

Section 54.054. Nonresident Status: Presumption; Reclassification

"A nonresident student classification is presumed to be correct as long as the residence of the individual in the state is primarily for the purpose of attending an educational institution. After residing in Texas for at least 12 months, a nonresident student may be reclassified by the Coordinating Board, Texas College and University System. Any individual reclassified as a resident student is entitled to pay the tuition fee for a resident of Texas at any subsequent registration as long as he continues to maintain his legal residence in Texas. Before February 15, 1972, the Coordinating Board,

Texas College and University System, shall promulgate such rules and regulations."

Amended by Acts 1971, 62nd Leg., p. 3353, ch. 1024, art. 2, §29, eff. Sept. 1, 1971.

Section 54.055. Parents, Change of Residence to Another State

"An individual 21 years of age or under whose parents were formerly residents of Texas is entitled to pay the resident tuition fee following the parents' change of legal residence to another state, as long as the individual remains continuously enrolled in a regular session in a state-supported institution of higher education."

Amended by Acts 1971, 62nd Leg., p. 3354, ch. 1024, art. 2, §29, eff. Sept. 1, 1971.

Section 54.056. Effect of Marriage

"A nonresident who marries and remains married to a resident of Texas, classified as such under this chapter at the time of the marriage and at the time the nonresident registers, is entitled to pay the resident tuition fee regardless of the length of time he has lived in Texas; and any student who is a resident of Texas and who marries a nonresident is entitled to pay the resident tuition fee as long as he does not adopt the legal residence of the spouse in another state."

The primary constitutional challenge is directed by the Plaintiff-Respondents at Section 54.052 above which describes the status of a student as a resident and a nonresident for tuition purposes.

Section 54.054 allows a nonresident student to be reclassified as a resident student for tuition purposes after residing in Texas for at least 12 months under the provisions set out in the rules and regulations adopted by the Coordinating Board, Texas College and University System.

QUESTIONS PRESENTED ARE RE-STATED FOR ARGUMENT TOGETHER

Where the laws of the State, which are challenged in the Complaint on constitutional grounds, have been recently upheld as constitutionally valid by a Three-Judge Court and by the United States Supreme Court in a recent similar case, is the District Court judicially in error to dismiss the Complaint on the basis that no substantial federal question remains to be decided?

Does an alleged misapplication of valid Texas statutes which prescribe resident requirements for tuition purposes in Texas Colleges constitute a violation of Plaintiff-Respondents constitutional rights such as to present a substantial federal question for the determination of a Three-Judge Court?

It is the contention of Petitioners that the District Court was correct in holding that *Starnes v. Malkerson*, supra, and *Weaver v. Kelton*, supra, have answered all of the substantial constitutional challenges brought by Plaintiffs-Respondents against the above Texas statutes of the Education Code and that therefore the constitutional claims brought in the instant suit are insubstantial.

This Court affirmed the findings and holdings of a Three-Judge Court in *Starnes v. Malkerson*, supra, in the following respects:

1. In answering the Plaintiff's assertion that the Court was dealing with the infringement of a basic, fundamental right—the right to interstate movement—and that we must apply the "compelling state interest" test, the above Court distinguished *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22L.Ed.2d 600 (1969) from *Starnes*, supra, and said *Starnes* was not a case of an infringement of a fundamental right and that the exacting standards of the compelling state interest test have no application.

The Court said that unlike *Shapiro* they found the one-year durational residence requirement challenged in *Starnes* did not constitute a penalty upon the exercise of the constitutional right of interstate travel and that the regulation's constitutionality should be tested under the traditional equal protection standards, citing *Shapiro v. Thompson*, supra, 394 U.S. at 638, n 21, 89 S.Ct. 1322.

2. In approaching the challenge by Plaintiffs that the statutory discrimination was a violation of Plaintiff's Equal Protection rights, the Court in *Starnes* cited *Morey v. Doud*, 354 U.S. 457, 465, 77 S.Ct. 1344, 1350, 1 L.Ed.2d 1485 (1957), *Reynolds v. Sims*, 377 U.S. 533, 565, 84 S.Ct. 1362, 1383, 12L.Ed.2d. 506 (1964), *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 1145 (1968), *Carrington v. Rash*, 380 U.S. 89, 92, 85 S.Ct. 775, 778, 13 L.Ed.2d 675 (1965), *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1158, 25 L.Ed.2d 491 (1970), *Lindsey v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 31 S.Ct. 337, 340, 55 L.Ed. 369,

Metropolis Theare Co. v. City of Chicago, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730, and *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, and said that statutory discrimination must be based on differences that are reasonably related to the legitimate purposes and intent of the Act complained of, and that if the classification complained of has some reasonable basis it does not offend the Constitution simply because in practice it may result in some inequality. The Court quoted out of *McGowan v. Maryland*, supra: "a statutory discrimination will not be set aside if any state of facts, reasonably may be conceived to justify it."

3. In disposing of the challenge that the one-year waiting period to acquire resident status for tuition purposes is arbitrary and unreasonable to presume that a person who has not resided within the state for a year is a nonresident student, and that it is reasonable to require that to rebut this presumption the student must be a bona fide domiciliary of the State for one year.

The regulation provides that an out-of-state student enrolled in the University is considered to be in the State primarily for the purpose of attending school, and is presumed not to be in the State as a permanent resident. This presumption can be overcome if the student provides sufficient evidence to show bona fide domiciliary within the State, one element of which is proof that he has resided within the State for a period of one year. In this requirement the Court found no arbitrary or permanent classification of the type found to constitute invidious discrimination in *Carrington v. Rash*, supra.

4. In the *Starnes* case the Court disposed of the question of whether the classification of the plaintiffs as nonresident students for tuition purposes is

reasonably related to a legitimate objective of the State. *McGowan v. Maryland*, supra, was further cited on the point of law that *it is enough that a solid foundation for the State regulation can be found in any one of the grounds set forth* (366 U.S. at 426), and then, in accordance with *Kirk v. Board of Regents of University of California*, 273 Cal.App.2d 430, 78 Cal.Rptr. 260 (1969), App. dismissed for want of a substantial federal question, 396 U.S. 554, 90 S.Ct. 754, 24 L.Ed.2d 247 (1970), which held that the State regulation classifying students as residents or nonresidents for tuition purposes is not arbitrary or unreasonable and bears a rational limitation to the States objective and purpose of financing, operating, and maintaining its many publicly financed educational institutions of higher learning.

All of the substantial constitutional challenges contained in the instant suit have been dealt with and were dealt with in *Starnes* and *Weaver* along with the cases cited therein, and the District Court was correct in finding that a substantial federal question did not remain for action by the Court.

There is nothing sufficiently alleged in Plaintiff-Respondents Complaint which would constitute a violation of a fundamental constitutional right. Any regulation by the State of Texas of the residence of students for tuition purposes is reasonable and bears a rational limitation to the State's purposes and objectives of the Act.

The Court below erred in not affirming the action by the District Court. Alleged misapplication of the Sta-

tutes by the College Registrars does not present a substantial federal question for action by the Federal Courts. It is a State matter.

CONCLUSION

All of the substantial constitutional challenges contained in the Complaint of the instant suit were answered in *Starnes*, supra, and *Weaver*, supra, and the cases cited therein, all of which were relied upon by the District Court in dismissing the suit for lack of a substantial federal question remaining for action by the Court.

The Court below erred in reversing the Order of the District Court upon the grounds that alleged misapplication of the statutes complained of by the College Registrars presented a further federal question for action by the federal courts.

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

JOHN W. ODAM
Staff Legal Assistant Attorney General

J. C. DAVIS
Assistant Attorney General

SAM L. JONES, JR.
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, SAM L. JONES, JR., one of the attorneys for the Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ___ day of March, 1974, a true and correct copy of the foregoing Petition for Writ of Certiorari To The United States Court Of Appeals for the Fifth Circuit was served upon Peter D. Williamson, 1320 Americana Building, Houston, Texas, 77002, Attorney for Respondents, by placing same in the United States Certified Mail with sufficient postage attached.

SAM L. JONES, JR.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-2714

Summary Calendar*

MARVIN A. WURZER, ET AL.,
Plaintiffs-Appellants,

versus

UNIVERSITY OF HOUSTON,
LAMAR UNIVERSITY, ET AL.,
Defendants-Appellees.

(December 7, 1973)

Before THORNBERRY, GOLDBERG and RONEY,
Circuit Judges.

PER CURIAM: Plaintiffs requested a three-judge court to hear their suit challenging the constitutionality of Texas statutes which prescribe different college tuition fee schedules for residents and nonresidents and establish a one-year presumption of non-residency for recent transferees into the state. The District Court denied the request for a three-judge court on the ground that the complaint presented no substantial federal question.

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th cir. 1970. 431 F. 2d 409, Part i.

The District Court predicated its decision on *Stanrs v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970) (Three-Judge), *aff'd,* 401 U.S. 985 (1971), and *Weaver v. Kilton,* ___ F. Supp. ___ (E.D. Tex. 1973) [C.A. No. 7784, April 24, 1973]. In *Starns,* the United States Supreme Court summarily affirmed a Three-Judge District Court's decision upholding the validity of Minnesota's tuition differential between resident and nonresident students and the State's presumption of nonresidency for those who had lived in Minnesota for less than one year. In *Weaver,* a Three-Judge Court in the Eastern District of Texas upheld the constitutionality of the Texas Statute here under attack.

The issue on this appeal is whether a substantial question remains concerning the constitutionality of the Texas statutes in light of these prior decisions.

The role of prior decisions vis-a-vis convening a Three-Judge District Court was recently discussed by the Supreme Court in *Goosby v. Osser,* ___ U.S. ___ (1973).

> In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions which merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281—A claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

In light of the discussion, we do not think *Starns* and *Weaver* rendered the constitutional claims against these Texas statutes insubstantial.

Starns was decided on somewhat different facts from those alleged in the case at bar. In *Starns*, the plaintiffs were married women who moved to Minnesota and attempted within the one year period to enroll as resident students. In the case *sub judice*, the complaint alleges that a number of the plaintiffs have lived in Texas more than one year; a number of the plaintiffs are unmarried females; some plaintiffs are under 21 years of age; some are receiving support from, or are living with parents; some were born in Texas, left, and returned later; some worked full-time before entering the respective school attended; and some have paid State taxes for varying periods.

In addition, the holding in *Starns* has been questioned by Justices Marshall and Brennan in their concurrence in *Ulandis v. Kline*, ___ U.S. ___ [No. 72-493, June 11, 1973].

> I recognize that in *Starns v. Malkerson*, 401 U.S. 985 (1971), we summarily affirmed a district court decision sustaining a one-year residency requirement for receipt of in-state tuition benefits. But I now have serious question as to the validity of that summary decision in light of well-established principles, under the Equal Protection Clause of the Fourteenth Amendment, which limit the States' ability to set residency requirements for the receipt of rights and benefits bestowed on bona fide state residents. *See Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Id. at ____.

Weaver, as a case from the Eastern District of Texas, has only advisory value in the Southern District of Texas. The strength of the case as a precedent here is further lessened because it apparently could have been disposed of without reaching the constitutional issue.

> Thus, having failed to allege the jurisdictional statutes necessary to invoke limited, federal jurisdiction, the instant complaint is fatally defective and must be dismissed.
>
> . . .
>
> Even though Plaintiff has not shown any jurisdictional prerequisites, some comment on the merits seems advisable in view of the sentiments and interest in the issues. Therefore, for purposes of discussion, the Plaintiff's Complaint will be treated as if jurisdiction has been properly pled and proved.

____ F. Supp. at ____.

The prior decisions do not "inescapably render the claims frivolous" and a three-judge court should have been requested. We, of course, initmate no opinion as to the ultimate dispostion of the merits of the controversy.

REVERSED AND REMANDED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N.O., La.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS
OFFICE OF THE CLERK

V. Bailey Thomas
CLERK

Post Office Box 61010
Houston, Texas 77061

re: CA 73-H-302-— Marvin A. Wurzer, et al. v. University of Houston, et al

TO ALL COUNSEL OF RECORD:

Gentlemen:

Judge Carl O. Bue has made the attached Calendar Ruling dated 5/4/73.

Very truly yours,

V. BAILEY THOMAS, CLERK

By: _____ (Miss)
Rona O'Quinn, Deputy

rlo

Attachment

Marvin A. Wurzer, et al v. University of Houston, Et al
Civil Action 73-H-302

5/4/73: Defendants' unopposed motion to dismiss pursuant to Rule 12(b), Red. R. Civ. P., is granted. Counsel shall prepare and submit an appropriate order within ten (10) days. Clerk will notify counsel.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOURTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

Marvin Wurzer, et al	x	
	x	
Plaintiffs,	x	
	x	
v.	x	
	x	
University of Houston,	x	
Lamar University,	x	Civil Action No. 73-H-302
Coordinating Board, Texas	x	
College and University	x	
System, Norris Kelton,	x	
Dean, Lamar University	x	
Ramon Vitulli, Dean,	x	
University of Houston,	x	
	x	
Defendants	x	

ORDER

CAME ON this day for consideration by the Court Defendants' Motion to Dismiss; and the Court having considered all authorities and arguments presented in support of said Motion and having concluded in light of *Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), aff'd. without opinion, 401 U.S. 985 (1971) and the Memorandum Opinion entered in *Weaver v. Kelton, et al.* Civil Action No. 7784 (E.D. Tex. 1973) that the Complaint herein does not present a substantial federal question and that Defendants' Motion is therefore meritorious; it is accordingly

ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss is herein in all things GRANTED and that the Complaint herein be and the same is hereby DISMISSED with prejudice and costs assessed to Plaintiffs.

ENTERED this ____ day of May, 1973.

_____

UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

Janis L. Weaver, Individually and For The Class She Represnts, Plaintiff	x	
Vs.	x	Civil Action No. 7784
Norris Kelton, Dean of Admissions And Records of Lamar University, et al., Defendants	x	

Honorable Phillip Bordages
Attorney at Law
2860 Park
Beaumont, Texas 77701

Honorable Peter D. Williamson
Attorney at Law
1320 Americana Building
Houston, Texas 77702

Attorneys for Plaintiff

Honorable John L. Hill
Attorney General of Texas

Honorable Sam L. Jones, Jr.
Assistant Attorney General
Capitol Station
P.O. Box 12548
Austin, Texas 78711

Attorneys for Defendants

MEMORANDUM OPINION

On August 1, 1971, Plaintiff Weaver moved from the State of Kansas to Vidor, Texas, where her husband accepted employment. Shortly thereafter, the Weavers purchased a home, registred to vote, and became subject to state and local taxes following their move to Vidor. Approximately four months later, Plaintiff Weaver enrolled in Lamar University for the January 1972 term and was classified a "nonresident" student because she did not meet the requirment of Section 54.052 (e)[1] of the Texas Education Code, which provides that an individual in Plaintiff's position can be classified a resident student only if she resides in Texas for a twelve-month period preceding her entrolling in an educational institution. Because of her nonresident classification, Plaintiff was required to pay a tuition rate ten times greater than that which was required of students who were classified as residents of Texas.

Believing herself to be a bona fide resident of Texas since August 1971, Plaintiff Weaver appealed her classification through the administrative channels afforded her under the Rules and Regulations of the Coordinating Board, Texas College and University Sys-

[1]Section 54.052 (e) reads:

> An individual 21 years of age who resides out of the state or who has come from outside Texas and who registers in an educational institution before having resided in Texas for a 12-month period shall be classified as a nonresident student.

tem, which are supplemental procedures adopted to implement Section 54.052 (e) and its companion, Section 54.054.[2] Plaintiff unsuccessfully prosecuted administrative appeals to Lamar University's Dean of Admissions and Records and to the Board of Regents.

Plaintiff continued to pay out-of-state tuition fees through the 1972 summer session, but she became eligible for reclassification in August 1972, having resided in Texas for a full twelve-month period. After making application, Plaintiff was reclassified as a resident student and was permitted to pay "in-state" tuition rates;[3]

[2] Section 54.054, which is captioned Nonresident Status: Presumption; Reclassification, reads:

A nonresident student classification is presumed to be correct as long as the residence of the individual in the state is primarily for the purpose of attending an educational institution. *After residing in Texas for at least 12 months, a nonresident student may be reclassified as a resident student as provided in the rules and regulations adopted by the Coordinating Board, Texas College and University System. Any individual reclassified as a resident student is entitled to pay the tuition fee for a resident of Texas at any subsequent registration as long as he continues to maintain his legal residence in Texas.* Before February, 1972, the Coordinating Board, Texas College and University System, shall promulgate such rules and regulations.

[3] Since this suit has been filed, Plaintiff Weaver has subsequently graduated from college. Some intimation arose in the hearing of this cause that Plaintiff's reclassification, bolstered by her graduation, has rendered this cause moot. This Court rejects that interpretation in view of the class action allegations unless one were completely convinced that this Plaintiff was no longer a proper representative of the class. In any event, the gambit of issues surrounding Plaintiff's classification and reclassification remain viable so long as any possible charges paid by Plaintiff are excessive and are retained by the State of Texas.

however, despite her reclassification Plaintiff maintained a conviction that her initial classification as a nonresident was improper and violative of her constitutional rights. Therefore, Plaintiff continued to pursue this suit, which she had filed shortly before her reclassification, in order to have Section 54.054 (e) of the Texas Education Code declared to be unconstitutional as a denial of Equal Protection and Due Process.[4] Application for a three-judge court was made eventually, and under the procedures outlined in *Jackson v. Choate,* 404 F. 2d 910 (5th Cir. 1968), the Chief Judge of the circuit empaneled the present court.

I.

Jurisdiction

While the parties have not argued the formality of jurisdiction in the perspective held by this panel, this Court feels compelled to find that Plaintiff has not made proper allegations to invoke federal jurisdiction. Plaintiff's sole allegation of jurisdiction is only a bald assertion that the action is brought under the Four-

[4] Plaintiff's complaint alleges only a violation of Equal Protection. While Due Process was passingly mentioned in argument, Plaintiff's brief indicates that due process reliance is made on the strength of *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). *Bolling,* a decision in which racial segregation in Washington, D.C. was found to be violative of the Fifth Amendment since the Fourteenth Amendment applied only to the states, deserves only incidental consideration here and is therefore given only this minimal treatment.

teenth Amendment to the Constitution of the United States and that the amount in controversy exceeds $10,000.00 exclusive of interests and costs.

The Fourteenth Amendment secures a panorama of rights to the citizens and lawfully admitted aliens of the United States; however, Plaintiff confuses the mandate recognizing the *right* with the power to *remedy* violations thereof. *Morris v. Travisono,* 310 F. Supp. 857 (D. Minn. 1970). The Fourteenth Amendment does not confer jurisdiction on federal courts. *Kochhar v. Auburn University,* 304 F. Supp. 565 (M.D. Ala. 1966). Since that amendment only secures rights to citizens and the power of Congress to provide remedies through enabling legislation, it is necessary that every plaintiff set out in a complaint the applicable enabling acts, particularly the appropriate jurisdictional statutes. Thus, having failed to allege the jurisdictional ststutes necessary to invoke limited, federal jurisdiction, the instant complaint is fatally defective and must be dismissed.

II.

Applicable Law

Even though Plaintiff has not shown any jurisdictional prerequisites, some comment on the merits

seems advisable in view of the popular sentiments and interest in the issues. *Therefore, for purposes of discussion the Plaintiff's Complaint will be treated as if jurisdiction had been properly pled and proved.*

Althogh Plaintiff can present argument with some appeal, *Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), *aff'd without opinion,* 401 U.S. 985 (1971) seems largely dispositive of the instant case. In *Starns* two women moved to Minnesota from Illinois when their husbands obtained employment there; they attempted to register as residents in a state university before they had resided in Minnesota for twelve months; however, they were classified as nonresidents because university regulations established an irrebutable presumption that any person who had not continuously resided in Minnesota for one year immediately before enrolling in a university would be a nonresident for tuition purposes. The *Starns* three-judge panel upheld the Minnesota regulation even with a challenge based on *Shapiro v. Thompson,* 394 U.S. 618 (1969), the decision which invalidated certain year-long residency statutes for state welfare recipients. The *Shapiro* decision was argued to show that no compelling state interest justified the discrimination resulting in Minnesota's classification of some bona fide residents as non residents since the state regulation infringed on a constitutionally-protected personal fundamental right, the right to interstate movement. However, *Shapiro*

was found to be distinguishable from *Starns* because *Shapiro* dealt with states' admitted attempt to "fence-out" indigents by denying them life's basic necessities and because the facts showing the proportion of out-of-state students to in-state students simply did not support the plaintiffs' contention.[5] With no supporting proof, the *Starns* decision expressly disposed of any possible assertion of a right to interstate movement as the basic fundamental right involved in the dispute over whom a state may legitimately classify as a non-

[5] One might note that it is difficult to imagine the quantum and kind of proof which would support this contention. The *Shapiro* plaintiffs were fortunate in having express statements which reflected that the one-year waiting period for welfare assistance had the specific objective of excluding the indigents who would move to get advantage of the better benefits offered by some states. *Shapiro*, 394 U.S. at 628-29. The *Starns* plaintiffs were likewise fortunate in having statistics on the number of college students coming from out-of-state as compared with the number of students in-state, which indicated that the one-year period did not "deter any appreciable number of persons from moving into the state." *Starns*, 326 F. Supp. at 237-38. However, the meager statistics introduced at the hearing of this cause are not conclusive in themselves and they have not been persuasively argued. Isolated figures from one university which are unassociated from an analysis of the motivations of students cannot prove that student residency statutes hinder entrance into a state, although a high percentage of out-of-state students could show that the durational residency statutes do not deter students from moving into a state. Too many variables other than the higher tuition fees for out-of-state students could account for some states having larger percentages of out-of-state students than others. Choice of higher education is commonly known to be a matter largely of personal preference, family tradition, institutional reputation and quality of education as well as other intangibles occasionally preferred in some states, such as moderate climate and abundant recreational facilities.

resident student; and, this Court has found no argument, authority or proof offered by the instant plaintiff which dispells the reasoning of *Starns* on this point. Plaintiff Weaver has attempted to go one step beyond *Starns,* however, by asserting that another fundamental right is at stake over and above the right of interstate movement, the sole fundamental right asserted in *Starns.* Plaintiff asks this Court to recognize that the Texas statute infringes on the right of citizens to an education, or more precisely, the right to equal access to an education. Suffice it to say that the recent case, *San Antonio Independent School District v. Rodriquez,* decided March 21, 1973 ___ U.S. ___ (41 U.S.L.W. 4407) has put such a notion to rest for the present, at least insofar as such right being constitutionally founded.

Without the presence of a fundamental personal liberty graced with constitutional protection—the freedom of interstate movement being inapplicable and the right of equal access to education being unfounded in the constitutional sense—the strict judicial scrutiny test used to determine if state statutes violate Equal Protection cannot be applied. Since the strict test is inapplicable, the state statutes must be afforded the usual presumption of validity and the Defendants do not have to "carry a 'heavy burden of justification,' that the State must demonstrate that its educational system has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the

'least drastic means' for effectuating its objectives." *Id.* at 4411-12.[6]

Even though the strict judicial test could not be used herein, the statute would still be required to muster pass the test of whether it has a rational relationship to a legitimate state interest. Once again, the *Starns* decision has given guidance. In that case, it was noted that the year-long residency statute was rationally related to an objective of the state because it was reasonable to require a person coming from out-of-state to live for a year as a bona fide domiciliary within the state in order to rebut the presumption that one who has not lived in the state previously is a nonresident. Moreover, *Starns* also further explained that since the law afforded the states the right to discriminate in tuition

[6] *Rodgriquez* extensively reviewed previous court rulings in explaining that two tests have developed when sondiering if state statutes possibly violate Equal Protection. The strict test is applied when the state statute interferes with fundamental rights or involves suspect classifications; thus, if the statute is found intruding in the area of constitutionally protected rights, the states has the burden of showing that the statute serves a compleling state interest. Without a compelling state interest, the state cannot hinder the rights guaranteed to citizens. See *Dunn v. Blumstein,* 405 U.S. 330, 335 (1972). *See also e.g., Kramer v. Union School District,* 395 U.S. 621 (1969). However, if the classification of citizens created by the state statute, which is alleged to be discriminatory, does not affect a fundamental right or a suspect classification, constitutionality of the statute is tested on the basis of whether the statutes have been written so that they have some rational relation to a legitimate state interest. *See e.g., McGowan v. Maryland,* 366 U.S. 420 (1961).

charges between residents and nonresidents[7] that right to discriminate may be retained so that newcomers to the state shall make a contribution towards the welfare of the state's higher educational facilities. *Stanrs, supra* at 240-41.

In final analysis, we find that the issues relating to the Texas statute not dissimilar to those which confronted the Minnesota district court, and we believe that the rationale approved therein should be now controlling. Perhaps it should be stated that the citations of Plaintiff, which show that there have been successful challenges to student residency statutes in Connecticut, New Mexico and Colorado,[8] have not gone completely unnoticed. In those cases, the offending statutory enactments were found to create abhorrent conditions in that once a student was classified as a nonresident it was either impossible for him to get reclassified or it was necessary for him to all but forego a whole year's education by enrolling for a low minimum number of semester hours. Understandably, these statutes were determined to suffer constitutional infirmities; however, the Texas statutes are easily disting-

[7] *See Johns* v. *Redeker,* 406 F. 2d 878, 883 (8th Cir. 1969) for an explanation that reasonable tuition charges to nonresident students tend to make the tuition charged more nearly approximate the cost per pupil of the operations of schools.

[8] *Kline v. Vlanids,* 346 F. Supp. 526 (D. Conn. 1972), *cert. granted,* ___ U.S. ___; *Robertson V. University of New Mexico,* 350 F. Supp. 100 (D.N.M. 1972); *Covell v. Douglas,* 510 P. 2d 1047 (Colo. 1972).

uishable in that they make allowance for future reclassification of nonresidents after they have overcome the presumptions set out in the statutes. No better proof of this fact can be mentioned than that the Plaintiff in this case was herself reclassified under the procedural steps afforded her.

In conclusion, one word of caution should be noted. Plaintiff Weaver attacked only Section 54.052 (e) of the Texas Education Code, the only section which she had standing to attack. In addition, the supplemental Rules and Regulations of the Coordinating Board, Texas College and University system, have other factors to be considered in the reclassification process. This Court, nevertheless, declines to comment on any other portion of the Texas classification scheme for the reason that the discussion of this opinion is deliberately confined to Plaintiff Weaver and those who fall within the matrix of facts she presents.

Plaintiff's Complaint is Dismissed, and judgment will be entered accordingly.

DATED this 24th day of April, 1973

_____

UNITED STATES CIRCUIT JUDGE

_____

UNITED STATES DISTRICT JUDGE

_____

UNITED STATES DISTRICT JUDGE

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IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1443

UNIVERSITY OF HOUSTON,
LAMAR UNIVERSITY, ET AL., *Petitioners*

v.

MARVIN WURZER, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

To The Honorable Supreme Court Of The United States:

The Respondents, MARVIN WURZER, ET AL., pray that a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit reversing and remanding the Judgment and Order of the District Court for the Southern District of Texas, a Petition for rehearing was denied by the Court of

Appeals on December 28, 1973. The order of the District Court for the Southern District of Texas was reversed and remanded.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition.

QUESTIONS PRESENTED

I.

For the purposes of satisfying 28 U.S.C. §2281, does a substantial question remain concerning the constitutionality of certain Texas statutes which prescribe different college fee schedules for residents and nonresidents, and which establishes a one-year presumption of nonresidency for recent transferees into the State of Texas.

II.

Pursuant to 28 U.S.C. §2281, can a three-judge panel be properly convened to hear complaints of a misapplication of a Texas statute resulting in a violation of Plaintiff-Respondents' constitutional rights.

STATUTE INVOLVED

The challenged sections of the Texas Education Code, Sections 54.051 through 54.056 are reprinted here for consideration as follows:

Section 54.051. Tuition Rates

"(a) The governing board of each institution of higher education shall cause to be collected from

students registering at the institution tuition or registration fees at the rates prescribed in this section.

"(b) Tuition for resident students, except as otherwise hereinafter provided, is $4 per semester credit hour, but the total of such charge shall not be less than $50 per semester.

"(c) Tuition for nonresident students, except as otherwise hereinafter provided, is $40 per semester credit hour.

"(d) Resident or nonresident students registered for thesis or dissertation credit only, in those instances where such credit is the final credit hour requirement for the degree in progress, shall pay a sum proportionately less than herein prescribed but not more than $50.

"(e) Tuition for resident students registered in a medical or dental branch, school or college is $400 per academic year of 12 months.

"(f) Tuition for nonresident students registered in a medical or dental branch, school or college is $1,200 per academic year of 12 months.

"(g) Resident or nonresident students registered for a course or courses in art, architecture, drama, speech, or music, where individual coaching or instruction is the usual method of instruction, shall pay a fee in addition to the regular tuition, said fee to be designated by the governing board of such institution; but in no event shall such fees be more per course per semester of four and one-half months or per summer session than $75.

"(h) Tuition for students who are citizens of any country other than the United States of America is $14 per semester credit hour, but the total of such charge shall be not less than $200.

"(i) Tuition for students who are citizens of any country other than the United States of America registered in a medical or dental branch, school or college is $800 per academic year of 12 months.

"(j) Tuition for nonresident students registered in a public junior college is as provided in Subsection (b), Section 130.003 of the Texas Education Code.

"(k) Tuition for students registered in a school of nursing as a nursing student is $50 per semester and per 12-week summer session.

"(l) Tuition for students registered in a school of nursing as a nursing student for less than 12 semester credit hours of work or for less than a full semester credit hour or term hour load during a summer session shall pay an amount proportionately less than the amount provided in Subsection (k) of this section, but not less than $20.

"(m) Twenty-five cents out of each hourly charge in Subsection (b) and $1.50 out of each hourly charge in Subsection (c) of this section shall be placed in scholarship fund at each institution to be administered by that institution to award scholarships to needy students. Standards for determining need shall be formulated by each institution. No more than 10 percent of said scholarship funds may be allocated to out-of-state students.

"(n) Notwithstanding the preceding provisions of this section, any nonresident student who is enrolled for the spring semester of 1971 in an institution covered by this section may continue to enroll at the same institution at the same tuition rate that was effective at the time of his original enrollment until one of the following conditions first occurs:

(1) he receives the degree at the degree level (i.e., the baccalaureate, master's, or doctoral degree) toward which he is working during the spring semester of 1971; or

(2) he voluntarily withdraws from the institution or the institution involuntarily withdraws the student for disciplinary reasons or for failing to meet the academic standards of the institution; or

(3) the termination of the spring semester of 1975.

"(o) A teaching assistant, research assistant, or other student employee of any institution covered by this section is entitled to register himself, his spouse, and their children in a state institution of higher education by paying the tuition fees and other fees or charges required for Texas residents, without regard to the length of time he has resided in Texas; provided that said student employee is employed at least one-half time in a position which relates to his degree program under rules and regulations established by the employer institution. This exemption shall continue for students employed two consecutive semesters through the summer session following such employment if the institution is unable to provide employment and, as determined under standards established by the institution, if the employee has satisfactorily completed his employment.

"(p) A nonresident student holding a competitive scholarship of at least $200 for the academic year or summer for which he is enrolled is entitled to pay the fees and charges required of Texas residents without regard to the length of time he has resided in Texas, provided that he must compete with other students, including

Texas residents, for the scholarship and that the scholarship must be awarded by a scholarship committee officially recognized by the administration of the institution of higher education."

Amended by Acts 1971, 62nd Leg., p. 3352, ch. 1024, art. 2, §29, eff. Sept. 1, 1971.

Section 54.052. Residents; Nonresidents; General Rules

"(a) The term 'residence,' as used in this subchapter, means 'domicile.' The term 'resided in' means 'domiciled in.' For the purposes of this subchapter, the status of a student as a resident or nonresident student is determined as prescribed by this section, subject to the other applicable provisions of this subchapter.

"(b) An individual under 21 years of age who is living away from his family and whose family resides in another state or has not resided in Texas for the 12-month period immediately preceding the date of registration shall be classified as a nonresident student.

"(c) An individual 21 years of age or under whose family has not resided in Texas for the 12-month period immediately preceding the date of registration shall be classified as a nonresident student, regardless of whether he has become the legal ward of residents of Texas or has been adopted by residents of Texas while he is attending an educational institution in Texas, or within a 12-month period before his attendance, or under circumstances indicating that the guardianship or adoption was for the purpose of obtaining status as a resident student.

"(d) An individual 21 years of age or over who has come from outside Texas and who is gainfully

employed in Texas for a 12-month period immediately preceding registration in an educational institution shall be classified as a resident student as long as he continues to maintain a legal residence in Texas.

"(e) An individual 21 years of age or over who resides out of the state or who has come from outside Texas and who registers in an educational institution before having resided in Texas for a 12-month period shall be classified as a nonresident student."

Section 54.053. Regulations of Coordinating Board.

"The governing board of each institution required by this chapter to charge a nonresident tuition or registration fee is subject to the rules, regulations, and interpretations issued by the Coordinating Board, Texas College and University System, for the administration of the nonresident tuition provisions of this subchapter. The rules, regulations, and interpretations promulgated by the coordinating board shall be furnished to the presidents or administrative heads of all Texas public senior or junior colleges and universities."

Section 54.054. Nonresident Status; Presumption; Reclassification.

"A nonresident student classification is presumed to be correct as long as the residence of the individual in the state is primarily for the purpose of attending an educational institution. After residing in Texas for at least 12 months, a nonresident student may be reclassified by the Coordinating Board, Texas College and University System. Any individual reclassified as a resident student is entitled to pay the tuition fee for a resident of Texas at any subsequent registration as long as he continues to maintain his legal residence in Texas. Before February 15, 1972,

the Coordinating Board, Texas College and University System, shall promulgate such rules and regulations."

Amended by Acts 1971, 62nd Leg., p. 3353, ch. 1024, art. 2, §29, eff. Sept. 1, 1971.

Section 54.055. Parents, Change of Residence to Another State.

"An individual 21 years of age or under whose parents were formerly residents of Texas is entitled to pay the resident tuition fee following the parents' change of legal residence to another state, as long as the individual remains continuously enrolled in a regular session in a state-supported institution of higher education."

Amended by Acts 1971, 62nd Leg., p. 3354, ch. 1024, art. 2, §29, eff. Sept. 1, 1971.

Section 54.056. Effect of Marriage.

"A nonresident who marries and remains married to a resident of Texas, classified as such under this chapter at the time of the marriage and at the time the nonresident registers, is entitled to pay the resident tuition fee regardless of the length of time he has lived in Texas; and any student who is a resident of Texas and who marries a nonresident is entitled to pay the resident tuition fee as long as he does not adopt the legal residence of the spouse in another state."

STATEMENT OF THE NATURE OF THE CASE

This litigation involves a complaint brought by student Plaintiffs attending the University of Houston and Lamar University against these institutions of higher learning which are official agencies of the State of Texas. The complaint prays "that a declaratory judgment shall issue

declaring Sections 54.051 through 54.056 of the Education Code of the State of Texas, are void as violating the Constitution of the United States insofar as the same are written and applied to Plaintiffs and to the classes which they represent."

The complaint further prays that "in the event the statute should be declared constitutional and valid—that the Court declare the statute unconstitutional as applied to each Plaintiff . . ."

The Defendant-Petitioners filed a Motion to Dismiss on the grounds that no substantial federal question was presented by the complaint and this motion was granted by the District Court.

The Court of Appeals for the Fifth Circuit reversed and remanded the case for the empaneling of a three-judge court.

REASONS FOR DENYING THE WRIT

1. The issues presented by Petitioner in the case at bar are not questions which may be properly brought before this Court. Rule 19 of the Rules of the Supreme Court of the United States clearly outlines the nature of questions on which this Court will grant a Writ of Certiorari and no amount of straining on the part of the Petitioners will bring their issues within the commands of Rule 19. These are clearly no "special and important reasons" for this Court to grant certiorari now requested by Petitioners.

2. The substantial question requirement of 28 U.S.C. § 2281 as most recently enunciated by this Court in *Goosby v. Osser,* 93 S.Ct. 854 (1973) clearly indicates that *Starnes v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), aff'd without opinion, 401 U.S. 985 (1971), and

Weaver v. Kelton, 357 F. Supp. 1106 (1973), are not prior decisions which would foreclose the subject of Respondents' constitutional attack upon certain Texas statutes.

3. Pursuant to 28 U.S.C. § 2281, a three-judge court shall be convened to hear complaints of unconstitutional state statutes as well as the unconstitutional misapplication of valid state statutes.

ARGUMENTS AND AUTHORITIES

Petitioners contend that Respondents' constitutional attack on certain statutes of the State of Texas is foreclosed by the previous opinions in *Starnes* and *Weaver.* Such a contention is completely without merit. Respondents would respectfully point to *Goosby v. Osser,* 93 S.Ct. 854 (1973):

> "Section 28 USC §2281 (28 USCS §2281) does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial. 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' *Bailey v. Patterson,* 369 U.S. 31, 33 L.Ed.2d, 82 S.Ct. 549 (1962), 'wholly insubstantial,' ibid., 'obviously frivolous,' *Hannis Distilling Co. v. Baltimore,* 216 U.S. 285, 288, 54 L.Ed. 482, 30 S.Ct. 326 (1910), 'obviously without merit,' *Ex parte Poresky,* 290 U.S. 30, 32, 78 L.Ed. 152, 54 S.Ct. 3 (1933). The limiting words 'wholly' and 'obviously' have congent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions which merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of

> 28 USC §2281 (28 USCS §2281). A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' *Ex parte Poresky*, supra, 290 U.S., at 32, 78 L.Ed. 152; see also *Levering and Garrigues Co. v. Morrin*, supra, 289 U.S. 103, 105, 77 L.Ed. 1062, 53 S.Ct. 549 (1933); *Hannis Distilling Co. v. Baltimore*, supra, 216 U.S., at 288, 54 L.Ed. 482; *McGilvra v. Ross*, 215 U.S. 70, 80, 54 L.Ed. 95, 30 S.Ct. 27 (1909). Id. at 858-59.

Employing this test of substantiality, it is clear that the subject of Respondents' constitutional attack upon the Texas statute in question is not foreclosed by the prior decision of this Court in *Starnes*. Further, Respondent would show that even Petitioner concedes that the fact situation in the case at bar is different from that found in Starnes. Petitioner's Brief for Certiorari at p. 5.

In *Starnes* and *Weaver*, Appellants were married women who moved to the complained of states and attempted to enroll as resident students, after having domiciled themselves in the respective states for less than one year; in the instant case, the complaint alleges that a number of the Plaintiffs have lived in the State more than one year; a number of the Plaintiffs are unmarried females; some Plaintiffs are under 21 years of age; some are receiving support from, or are living with parents; some were born in the State, left, and returned later; some worked full-time before entering the respective school attended; some have paid State taxes for varying periods; all, however, have been denied resident student status for tuition purposes, and each alleges that he/she in his/her

own right, and the class he/she represents, are unconstitutionally discriminated against in the setting of fees both by statute, rule and practice.

Further, Petitioners rely heavily on *Weaver,* but it should be noted that in the Court's opinion in that case the question of convening a three-judge panel to hear Plaintiff's complaint was reached only in dicta. Quite candidly, the Court in *Weaver* began its remarks on 28 U.S.C. §2281 by saying it was "For purposes of discussion." 357 F. Supp. at 1108.

It is apparent, then, that neither *Starnes* nor *Weaver* are authority for the critical factual issues raised by the Respondent.

As additional support for its position, Respondent would direct the Court's attention to *Vlandis v. Kline,* 93 S.Ct. 2230 (1973). Therein, Mr. Justice Marshall, with whom Mr. Justice Brennan joins, concurring, indicates that *Starnes v. Malkerson* is not irrevocably closed to further consideration by the Supreme Court of the United States. Mr. Justice Marshall:

> "I recognize that in *Starnes v. Malkerson,* 401 U.S. 985 (1971), we summarily affirmed a district court decision sustaining a one-year residency requirement for receipt of in-state tuition benefits. But I now have serious question as to the validity of that summary decision in light of well-established principles, under the Equal Protection Clause of the Fourteenth Amendment, which limit the States ability to set residency requirements for the receipt of rights and benefits bestowed on bona fide state residents. See *Dunn v. Blumstein,* 405 U.S. 330 (1972): *Shapiro v. Thompson,* 394 U.S. 618 (1969). Because the Court finds sufficient basis in the Due Process Clause of the Fourteenth Amendment to dis-

> pose of the constitutionality of the Connecticut statute here at issue, it has no occasion to address the serious equal protection questions raised by this and other tuition residency laws. In the absence of full consideration of those equal protection questions, I would leave the validity of a one-year residence requirement for a future case in which the issue is squarely presented."

Respondents would finally argue that Petitioner's contention that a three-judge panel cannot be properly convened to hear complaints of alleged misapplication of state statutes is equally without merit. Petitioner would propose a distinction between attacks on statutes and attacks upon the results of their administration. Such a distinction cannot withstand the inquiry of this Court and amounts to a basic misreading of the Courts prior decisions in this area. *Phillips v. United States,* 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941); *Turner v. Fouche,* 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970); *Schwegmann Bros. Giant S. Mkts. v. Louisiana Milk Com'n,* 365 F. Supp. 1144 (1973).

CONCLUSION

Respondent respectfully prays that this Court deny the Writ of Certiorari and would point to *Goosby v. Osser* as conclusive authority for the same.

Respectfully submitted,

SAM WILLIAMSON
Counsel for Respondents
1320 Americana Building
Houston, Texas 77002
228-8519

CERTIFICATE OF SERVICE

I, SAM WILLIAMSON, a Member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of May, 1974, a true and correct copy of the foregoing Respondent's Brief in Opposition to the United States Supreme Court was served upon SAM L. JONES, P. O. Box 12548, Capitol Station, Austin, Texas 78711, Attorney for Petitioners, by placing same in the United States mail with sufficient postage attached.

SAM WILLIAMSON